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Environmental Criminal Enforcement: A Mushroom Cloud

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ENVIRONMENTAL CRIMINAL ENFORCEMENT: A MUSHROOMING CLOUD†

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"—you don't need a weatherman, to know which way the wind's blowing"[1]

The Summer of 1988 will be long remembered on the Eastern seashore for the medical waste which washed up onto its once clean beaches. People were outraged, tourism was down, and the media had a field day. Wherever you went it was "*the*" topic of discussion. And the public refrain suddenly changed from "sue the bums" to "hang 'em." Not surprisingly, environmental cleanup and enforcement were major issues in the presidential race that Fall. And five months later, when the ill-fated Exxon Valdez ran aground and gushed eleven million gallons of oil into the pristine waters of Prince William Sound, Alaska, environmental enforcement became a *cause celebre*. You did not need a weatherman to see the ominous cloud of criminal enforcement mushrooming on the near horizon.

This public response, firm and sustained, embodied an appreciation that society's need for retribution and deterrence is better satisfied through criminal prosecution than civil law suits. Our first environmentalist president, Theodore Roosevelt, said in a com-

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[1] B. Dylan, "Subterranean Homesick Blues", *Bringing It All Back Home* (Columbia Records 1965).

pletely different context: "Speak softly and carry a big stick."[2] In the field of environmental enforcement, criminal prosecution had become the "big stick."

What has been happening in the field of environmental criminal enforcement? Where is it now headed? What has and should be the bar's response? The following is an attempt to place some perspective on this mushrooming area of law.

I. HISTORICAL PERSPECTIVE

While it has been a "federal offense" (misdemeanor) since the 1890's to pollute our rivers and harbors,[3] it was not until the 1980's that Congress finally enacted a wide-scale series of laws criminalizing environmental pollution and the failure to comply with the regulations designed to guard against it.[4] The timing was *not* an accident. It was precipitated by the two most dramatic environmental problems the country had ever faced: Love Canal and Three Mile Island.

If Alexis De Tocqueville had made his famous trip around America in the late 1900's instead of a century earlier,[5] he would, no doubt, have chronicled a federal legislative cycle to which we have grown accustomed. Essentially, the cycle has ten steps: (1) disaster (or scandal); (2) public outrage; (3) congressional hearings; (4) congressional legislation; (5) propounded regulations; (6) execu-

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[2] Speech by Theodore Roosevelt at the Minnesota State Fair, September 2, 1901, *cited in* THE OXFORD BOOK OF QUOTATIONS 408 (2d ed. 1959).

[3] Rivers and Harbors Appropriations Act of 1899, ch. 425, 30 Stat. 1121, 1151-55 (codified as amended at 33 U.S.C. §§ 401-467e (1982 & Supp. V 1987)).

[4] *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, § 604, 1988 U.S. CODE CONG. & ADMIN. NEWS (102 Stat) 2654, 2678 (codified as amended at 7 U.S.C. § 136*l* (1988)) (doubled maximum fine for knowing violations of Act to $50,000 per day of violation); Water Quality Act of 1987, Pub. L. No. 100-4, § 312, 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat.) 7, 42 (codified as amended at 33 U.S.C. § 1319(c) (Supp. V. 1987)) (increased penalties for knowing violations of Federal Water Pollution Control Act to maximum fine of $50,000 per day of violation, or imprisonment up to three years, or both); Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 109, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 1613, 1632 (codified as amended at 42 U.S.C. § 9603 (Supp. V 1987)) (raised penalties to maximum fine authorized by title 18 ($100,000) per day of violation; or up to three years imprisonment, or both)); Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 232(a), 98 Stat. 3221, 3256 (codified as amended at 42 U.S.C. § 6928(d) (Supp. V 1987)) (doubled penalties to maximum fine of $50,000 per day of violation, or maximum prison term of two years, or both).

[5] *See* A. DE TOCQUEVILLE, DEMOCRACRY IN AMERICA (1st ed. 1900) (scholarly study of American democracy in mid-1800s).

tive branch enforcement; (7) administrative decision making; (8) litigation; (9) judicial interpretation; and (10) reauthorization. In the area of environmental enforcement, we are now well into the second trip through this cycle which began back in the late 1970s in response to Love Canal and Three Mile Island. In particular, with regard to the environmental criminal statutes, we have now entered the second swing of the cycle. What has transpired?

Initially, Congress added a criminal offense provision to each of its hazardous waste statutes[6] (RCRA and CERCLA) and the Clean Water Act.[7] These criminal offenses were principally designed to encourage compliance with the regulatory scheme and to punish those who intentionally polluted (*i.e.*, the midnight dumper). Since then, misdemeanors have been elevated to felonies and "knowing endangerment" has been added as a particularly potent offense carrying up to fifteen years' imprisonment.[8]

The increase of criminal offenses, however, was merely the first step in the initiation of a "prosecutorial cycle" designed to generate the resources to prosecute these cases. The United States Department of Justice ("Justice") needed to add not only federal prosecutors, but agents to investigate possible violations and assist in the prosecution of the cases. Accordingly, in 1982, the United States Environmental Protection Agency ("EPA") established the National Environmental Investigation Center ("NEIC") and began hiring and training criminal investigators ("special agents") to accomplish this vital mission. In turn, Attorney General William French Smith designated a small group of attorneys in Justice's Land & Natural Resources Division ("Lands Division") to serve as the Environmental Crimes Unit to monitor cases and legislation and assist these new agents. In many instances these attorneys, headquartered in Washington, D.C. and concentrating exclusively

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[6] *See supra* note 4.

[7] *Id.*

[8] *See* Clean Water Act, 33 U.S.C. § 1319(c) (1982 & Supp. V 1987) (possible $250,000 fine and imprisonment up to 15 years for violation of "knowing endangerment"); Resource Conservation and Recovery Act, 42 U.S.C. § 6928(e) (1982 & Supp. V 1987) (same).

The general trend in all aspects of government has been towards the imposition of stricter penalties for environmental violations. *See* United States v. Protex Industries, Inc., 874 F.2d 740, 741 (10th Cir. 1989) (RCRA § 6928(e) not unconstitutionally vague as applied); Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136*l* (1988) (penalty for "knowing violation" increased from $25,000 to $50,000); U.S. DEPARTMENT OF JUSTICE, PRESS RELEASE NO. 89-422, DEPARTMENT OF JUSTICE GETS TOUGH ON ENVIRONMENTAL CRIMINALS (Dec. 27, 1989) (listing cases imposing penalties ranging from $2.25 million in fines to twenty-one months imprisonment).

on environmental prosecutions, would prosecute the cases alone or assist the various United States Attorneys' offices around the country in the prosecution. Federal Bureau of Investigation ("FBI") special agents were also brought in to assist the EPA's special agents in this effort because of the small number of EPA agents initially hired and the FBI's investigative expertise.

Though starting gradually, the successes of the program over the past seven years have been considerable. There have been over 500 indictments against individuals and corporations (165 corporations and 404 individuals), over 400 of which have resulted to date in convictions (127 corporations and 305 individuals).[9] Over $26,000,000 in criminal fines and over 270 years in jail time have been handed out (60 of which to be served).[10] This increase has been particularly dramatic over the past five years. For example, in 1983 approximately 40 indictments were issued against individuals and corporations while in 1988 over 124 indictments were issued.[11] Not surprisingly, during that same period, Justice successfully led the initiative to convince Congress to upgrade the misdemeanor offenses to felonies and to add a knowing endangerment offense that carries a possible fifteen year sentence.[12] In addition, in 1987, Attorney General Edwin Meese III elevated the fledgling unit to Section status, greatly increased its budget, and nearly doubled its manpower.

These latest legislative and departmental developments are indicative of the stubborn reality that criminal law enforcement, in the final analysis, is a resource intensive business which requires careful allocation to yield results proportionate to those resources expended. The prosecution of environmental crimes tends to be scientifically complicated and manpower intensive. Therefore, it was likely that Congress eventually would have to reclassify the misdemeanor offenses to felonies to yield impressive enough results to justify the considerable resources Justice and the EPA had chosen to expend on these environmental criminal cases. All this brings us to the inevitable question: What are the most likely future prospects of environmental criminal enforcement?

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[9] *See* U.S. DEPARTMENT OF JUSTICE, PRESS RELEASE No. 89-422, DEPARTMENT OF JUSTICE GETS TOUGH ON ENVIRONMENTAL CRIMINALS (Dec. 27, 1989).

[10] *Id.*

[11] *Id.*

[12] *See supra* note 8 (listing environmental statutes with "knowing endangerment" provisions).

II. Future Prospects: Growth, But Not Without Problems

While the summer of 1988 and the medical waste problem produced a clear public sentiment that has in turn prompted action by Congress and the executive branch, long term gains will only be accomplished slowly. The extraordinarily brief period of time Congress needed in 1988 to conduct public hearings and enact a medical waste bill[13] prior to the congressional and presidential elections was more than just a self-promotional reflex to a perceived public need. By November of 1988 it was clear that the next administration, whatever the party, would have to design and implement systems and strategies to bring about long-term criminal enforcement. With the Exxon oil spill on March 24, 1989, the stage that had been set was now aglow in kleig lights inviting greater prosecutorial efforts. However, it remains to be seen whether there will be an increase in funding at the EPA and Justice that proves large enough to raise criminal enforcement efforts significantly. Moreover, an even greater question remains as to whether the EPA and Justice will make the management and policy changes necessary not only to step up criminal enforcement efforts, but to do so with the added safeguards needed to avoid ill-conceived indictments that unfairly ruin reputations and indelibly undermine confidence in the enforcement effort.

One further factor that suggests a likely increase in the need for criminal enforcement is the looming problem regarding the *legal* disposal of hazardous waste. It is widely acknowledged among those in the disposal industry and at the EPA that there will be a steady increase in the amount of hazardous waste that must be *legally* disposed of over the next few decades, and a concomitant decrease in the number of sites at which it can be legally disposed. One need not be an economist to deduce that the cost of *legally* disposing of hazardous waste is going to increase. When that fact is combined with the reality that a considerable number of the companies engaged in hazardous waste disposal have, or have had, financially weak foundations, there is a higher than average probability that an increased number of companies in a lucrative and very competitive market will cut corners to enhance their competitiveness or to survive. This will, in turn, pose an enhanced

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[13] *See* Medical Waste Tracking Act of 1988, Pub. L. No. 100-582, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 2950, 2953-54 (to be codified at 42 U.S.C. § 6992) (criminal penalties apply to those who improperly generate, handle, or dispose of medical waste).

threat to the self-reporting system that is the cornerstone of the environmental regulatory framework. What will this and other factors suggesting a need for increased criminal enforcement mean at the federal prosecutorial level?

First, it is clear that there will be increasing pressure on Justice, the ninety-four United States Attorneys, the EPA, and the FBI to expend more resources to investigate and prosecute environmental crimes. To justify those expenditures, they will have to build sizeable cases where a successful result would gain considerable visibility and engender a greater degree of deterrence. In that regard, since the average Assistant United States Attorney or FBI agent is particularly well versed in the nonenvironmental offenses contained in Title 18, there is a great likelihood that these future environmental prosecutions will contain a greater number of other federal counts (*i.e.*, conspiracy, mail and wire fraud, false statements, obstruction of justice, and RICO).

If this is so, however, there will, by necessity, be increasingly complicated investigations, involving greater amounts of grand jury time and lengthier pre-indictment gestation periods. No doubt, there will also be greater use of the type of investigatory techniques that have been so successful in other criminal areas (*i.e.*, search warrants, wire taps, sting operations, and monitoring devices).[14]

In addition to these developments in the federal effort, it is also clear that there must and will be greater involvement at the state and local levels. Assuredly, the public reaction to the summer of 1988 and the Valdez oil spill were not lost on local law enforcement agencies. There is increased pressure and desire on their part to pursue environmental polluters vigorously, lest these agencies risk the wrath of the public.[15] Because they have greater investigatory and prosecutorial forces in the aggregate, state and local authorities will probably have a much greater potential in the long run to detect and deter pollutants. If it is true, as former Speaker

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[14] *See, e.g., In re* Search of 4801 Fyler Avenue, 879 F.2d 385 (8th Cir. 1989), *cert. denied* (no. 1990 WL 28433) (S. Ct. Mar. 19, 1990).

[15] *See, e.g., EPA Says Most States Will Make Deadline, Submit Capacity Assurance Plans on Schedule*, [May 1, 1989-Apr. 30, 1990] Env't Rep. (BNA) Vol. 20, No. 25, at 1088-89 (Oct. 20, 1989) (discussing the state response to pressure asserted by Greenpeace and the National Toxics Campaign to dispose of hazardous waste); *Broad Gauge Environmental Initiative Submitted for Signature-Gathering Process*, [May 1, 1989-Apr. 30, 1990] Env't Rep. (BNA) Vol. 20, No. 25, at 1100 (Oct. 20, 1989) (discussing extensive campaign by California citizens to get political backing for plans to safeguard public from environmental hazards).

of the House Tip O'Neil used to say, that "all politics is local," it is equally true that all law enforcement, ultimately, is local.

III. Resources and Restructuring

Putting aside state and local prosecutions, what needs to be done, at a minimum, on the federal level with respect to both the resources and the internal restructuring of the EPA and Justice in order to cope with the expansion in criminal enforcement?

With respect to resources, the EPA needs to quickly and significantly increase the number of special agents it has available to pursue criminal violations. For example, in 1988-89 there were approximately sixty special agents in the entire nation; less than six were assigned to Region II (New York, New Jersey) where the largest number of hazardous waste facilities in the nation are concentrated.[16] By comparison the Internal Revenue Service has nearly three thousand special agents nationwide, the FBI over nine thousand, and the Secret Service nearly two thousand.

Concomitantly, Justice, in order to keep pace with an agent influx, will have to expand significantly the number of attorneys devoted to prosecuting these cases. Presently, only twenty-five attorneys in the Lands Division devote all their time to monitoring, investigating, and prosecuting all cases nationwide.[17] In addition, the United States Attorneys will have to devote a larger number of attorney hours to conducting prosecutions of these cases. And in the jurisdictions where there are already sizeable numbers of cases (*i.e.*, the major industrial centers), these offices will have to designate one or more attorneys to specialize in this highly technical area of enforcement. While this need for more attorney time will be due in part to the sheer number of cases, it will also be particularly critical because of the type of investigations and prosecutions needed to justify such resources: long and arduous investigations, involving voluminous documents, complicated scientific evidence, and a broad range of witnesses.

Internally, both the EPA and Justice will need to restructure

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[16] Telephone interview with James L. Prange, Assistant Director for Criminal Investigations, Environmental Protection Agency (Feb. 2, 1990).

[17] It should be noted, however, that by comparison only a few U.S. Attorney's offices in the country have a *single* attorney that devotes the majority of his time to environmental investigations and prosecutions. Narcotics, corruption, organized crime, and other forms of white collar crime, understandably continue to demand the lion's share of the U.S. Attorneys' offices' time.

their present system to maximize the productivity of their manpower and safeguard against hasty and ill-conceived indictments. While there are many possible suggestions as to how that should be done, several surely bear noting.

With regard to the EPA, the agency's criminal enforcement program needs to articulate more clearly its criminal enforcement priorities and to deploy its resources accordingly. For example, one might think that conspiracies designed to frustrate and avoid the regulatory reporting system would be an acknowledged high priority with respect to the assignment of agents. Consistent therewith, the EPA needs to *restructure* its internal reward system so that, like the FBI, cases are weighted by degree of complexity and importance, placing a higher premium on quality than quantity in statistical evaluations of agent and budgetary performance. Finally, each of the ten regional offices of the EPA needs to have a person experienced in criminal investigations and prosecutions at the Deputy Regional Administrator level so that the goal of strong and effective criminal enforcement can be monitored and advocated *vis-a-vis* the region's civil enforcement effort.[18]

With regard to Justice, the single most important non-resource change that should be considered is a change in internal policy such that the Assistant Attorney General in charge of the Land and Natural Resources Division ("AAG Lands") would have prior authorization authority over all indictments and plea agreements in environmental criminal prosecutions. Such authority would better ensure: 1) a uniform national prosecution policy; 2) a thorough review of the legal and factual bases for seeking indictment; 3) minimization of local pressures on the exercise of prosecutorial discretion; and 4) optimal use of the Lands Division's expertise in these technical cases.

The present system guarantees only prior notice to the AAG Lands, and an opportunity to either require declination or further review prior to presentment to a grand jury.[19] This procedure

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[18] The EPA as an agency is not naturally inclined toward criminal enforcement because of its lack of experience in that area. The secrecy and extreme confidentiality required of grand jury investigations and related techniques is actually contrary to the nature of an agency that prides itself on openness to the public. Therefore, it is understandable that it will take time to effect a total integration of that enforcement culture into the agency.

[19] *See* U.S. Attorneys' Manual §§ 5-11.303, 5-11.304 (Dep't Just. 1988). While the AAG Lands has final authority regarding the ultimate decision whether or not to prosecute, *id.* § 5-11.303(A), the United States Attorney may *commence* any action simply by complying with the notification procedure. *Id.* §§ 5-11.303(C), 5-11.304. In practice, this notification

places too much reliance on cooperation and too great a risk that an indictment hastily drafted by those not sufficiently expert will be issued, only later to be found deficient or ill-conceived. Should that happen, a tremendous amount of irreparable damage will have already been done to the indicted corporation and/or individuals, thereby harming also the credibility of this vital and dynamic area of criminal enforcement both locally and nationally. Moreover, because the AAG Lands is in the best position to integrate effectively the Administration's criminal enforcement policies into each criminal case that is developed and, when necessary, to resolve differences with the appropriate parties at the EPA, it makes sense to place that final authority with him. Finally, the AAG Lands is in a far better position than the ninety-four United States Attorneys to ensure not only a uniform national criminal enforcement effort but also to balance it with the national civil enforcement effort he already oversees.

Perhaps with the advent of more expertise in the individual United States Attorney's offices it will become less necessary to have these safeguards built into the system. However, until then, the AAG Lands could be given the final authority over all indictments and plea agreements, as he has over civil enforcement complaints and settlements,[20] in order to maintain consistent and fair national policy and enforcement in this area.

Giving this prior approval and plea agreement authority[21] to an Assistant Attorney General is not without precedent.[22] As does the Assistant Attorney General in charge of the Tax Division, the AAG Lands oversees a highly technical area of criminal enforce-

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procedure does not necessarily provide the AAG Lands with sufficient time to review indictments and exercise their ultimate authority prior to the indictment being handed down. In some instances the U.S. Attorneys are either unaware of this provision or provide notice a short time prior to the date when presentment in the grand jury is scheduled. If required to obtain prior authorization, as in the tax area, the U.S. attorney would be compelled to ensure enough time.

[20] *Id.* § 5-12.111.

[21] At the present time the U.S. Attorneys need to seek approval from the AAG Lands with respect to plea agreements only if the proposed deal either "comprises the right of the United States to any civil or administrative remedies" under certain statutes or provides for sentencing "other than fine, imprisonment, probation or any combination of those sanctions." *Id.* § 5-11.323.

[22] The AAG Lands already has prior approval authority over all grants of immunity in environmental criminal prosecutions. *Id.* § 5-11.315. Moreover, the Assistant Attorney General in charge of the Criminal Division has prior approval authority over grants of immunity in all criminal cases, and, *inter alia*, over indictments on all RICO counts. *Id.* § 9-110.101.

ment that requires nationwide uniformity. While such a proposal would no doubt be controversial among some of the ninety-four United States Attorneys, it surely encompasses a much smaller number of cases (*i.e.*, 101 indictments versus approximately 2200) than that authorized by the Tax Division and it covers a more complex subject matter, heavily laden with policy issues. Given that the Assistant Attorney General under the present system already has the statutory and policy authority over all civil environmental enforcement complaints and settlements,[23] it seems only sensible that his authority be equally extended in the criminal area.

IV. The Private Bar's Role

With a likely marked increase in criminal investigations and indictments, what role can the bar play to assist clients in avoiding prosecution and to insure that the government proceeds fairly?

The environmental bar's initial reaction to the criminal enforcement effort that began in the early 1980s was predictable: it sought the assistance of experienced white collar criminal defense lawyers. Whether the potential problem arose in the context of regulatory or civil litigation, most environmental lawyers were not, and still are not, schooled in the ways of criminal defense. Conversely, the overwhelming majority of criminal defense lawyers have *no* background in, or knowledge of, the complicated and technical field of environmental law. And so a centaur-like team has emerged in many of the cases involving environmental crimes.

While this accommodation has assisted targets and defendants to date, in time it will grow impossibly cumbersome to maintain because of the increasing complexity of the investigations and the prosecutorial theories. It should be expected that a new breed of lawyer will emerge: equally versed in the technical field of environmental law and the specialty of criminal defense. That will, of course, take time since there are very few prosecutors, or former prosecutors, who have focused on environmental prosecution. Similarly, very few defense lawyers nationwide have ever been involved in the defense of an environmental case. Accordingly, by way of preventative advice, there are very few experienced attorneys to whom one can turn. In the meantime, for those who are counseling individuals and corporations on how to avoid criminal conduct,

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[23] *See supra* note 22 and accompanying text.

there are a series of minimal steps that the environmental lawyer can advise clients to take as a form of preventative medicine.

First, clients should be strongly encouraged to develop and maintain an aggressive internal audit program. They should realize that the cost of doing so in the short run will greatly outweigh the potential risks, financial and otherwise, in the long run. Indeed, it could be that a failure to establish such a system in the face of persistent problems constitutes evidence of an attempt to avoid accountability and, perhaps, is even indicative of a criminal state of mind.

Second, environmental counsel should strongly advise their clients and their employees about the dangers of failing to comply with the various reporting requirements provided by the statutes. And, even more forcefully, they should caution against misreporting the information required to be provided by those statutes. Invariably, careful document evaluations in grand jury investigations uncover either or both of these problems, and therewith a prosecutable case.

Third, the managers of corporate clients should be strongly advised to pay close attention to employee complaints regarding the failure to comply with regulations established by the EPA. Too often, employee complaints are discouraged or dismissed only to turn up later in the form of an anonymous or confidential tip to law enforcement officials. This safeguard is truly an inexpensive internal check against on-going violations and later prosecutions. In short, compliance-conscious employees should be encouraged, not treated like pariahs. Surely a company that fails in this regard acts at its own peril.

Finally, and most importantly, counsel should clearly stress to management and employees that the worst thing they could do is attempt to cover up or further falsify documents in order to avoid detection by the authorities. As troublesome to prosecutors and judges as environmental mishaps and false reporting can be, it is all the more troubling to find conspiratorial conduct designed to obstruct justice and frustrate law enforcement officials. Title 18 of the United States Code contains a virtual Pandora's box of different offenses (*i.e.*, obstruction of justice, wire fraud, false statements) to which seasoned investigators and prosecutors are well attuned and which they are eager to use to elevate a minor offense to a true "federal case." Damage control dictates that problems unearthed by management should be dealt with swiftly, com-

pletely, and with the advice of experienced criminal defense counsel in order to avoid a severe escalation, which will not only undermine the reputation and integrity of the company and its employees, but invariably will lead to a greater chance of criminal conviction.

CONCLUSION

Environmental criminal enforcement has clearly established itself as a critical priority in the white collar crime category among state, local, and federal prosecutors. It will, without question, be a high priority of the Bush administration and its successors.

As the government increases its prosecutorial resources and efforts, and while a new breed of criminal defense counsel is developing, the bar can serve an invaluable role by applying preventative medicine through counseling and damage control. The interests at stake in this are high for everyone. Regardless of the side of the courtroom on which one sits, the health and well-being of the citizenry looms in the background. The effective enforcement of these laws is clearly an objective everyone can support. Most importantly, the bar can continue to play a critical role in the years ahead by insuring that the government uses its "big stick" fairly when it is faced with the enormous public pressures that environmental criminal conduct can generate.